WILL THE REAL ELENA KAGAN PLEASE STAND UP? CONFLICTING PUBLIC IMAGES IN THE SUPREME COURT CONFIRMATION PROCESS

KEITH J. BYBEE †

Public confidence in the judiciary depends not only on the actual results of court rulings but also on the public's perception of judicial fairness. The avoidance of actual judicial impropriety is necessary to secure judicial legitimacy but it is not sufficient. Judges must also visibly appear to play the role of neutral arbiter in order to reduce the probability of actual bias and to maintain popular support. The widely recognized importance of judicial appearances suggests two questions: What images of the courts and judicial decision making were conveyed by then-Solicitor General Elena Kagan's confirmation process in the U.S. Senate? What is the significance of these images?

This Article seeks to answer these questions by examining the public's contradictory views of the Supreme Court's proper role in the American political landscape. Using these contradictory views as a backdrop, this Article then argues that national media coverage of the Kagan confirmation process conveyed a mix of images that closely corresponds with (and reinforces) the contradictory views of the Supreme Court already held by a large number of Americans.

---

† Paul E. and the Hon. Joanne F. Alper '72 Judiciary Studies Professor, Syracuse University College of Law; Professor of Political Science, Syracuse University Maxwell School of Citizenship and Public Affairs; Director, Institute for the Study of the Judiciary, Politics, and the Media at Syracuse University. I thank Shannon Johanni and Ken Williams for their excellent research assistance.

The Article concludes by explaining how the legitimacy of the judiciary and the public's contradictory views may ultimately have a stable coexistence.

One of the lighter moments in the Supreme Court confirmation process last summer occurred during the second day of hearings before the Senate Judiciary Committee. Senator Arlen Specter asked nominee Elena Kagan if she thought Supreme Court oral arguments should be broadcast on television.[1] Kagan warmly supported the idea and outlined the positive effects that televised arguments would have on the public as well as on the Court itself.[2] Kagan then identified a final consequence of placing cameras before the high bench: "It means that I'd have to get my hair done more often, Senator Specter."[3]

Then-Solicitor General Kagan's comment provided comic relief and, perhaps inadvertently, pointed toward an important fact about the judicial process: appearances matter a great deal for courts.[4] Scholars have frequently argued that public confidence in the judiciary depends not only on the actual results of court rulings but also on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle.[5]

---

1. Arlen Specter, Op-Ed., *Specter: 'Kagan Did Just Enough to Win My Vote'*, USA TODAY (July 14, 2010), http://www.usatoday.com/news/opinion/forum/2010-07-15-column15_ST1_N.htm.

2. *See id.* ("'It's always a good thing,' [Kagan] said, 'when people understand more about government, rather than less. And certainly, the Supreme Court is an important institution and one that the American citizenry has every right to know about and understand.'").

3. Sheryl Gay Stolberg, *Why Kagan Supports Broadcasting Oral Arguments*, N.Y. TIMES (June 29, 2010, 3:56 PM), http://thecaucus.blogs.nytimes.com/2010/06/29/why-kagan-supports-broadcasting-court-arguments.

4. *See* KEITH J. BYBEE, ALL JUDGES ARE POLITICAL—EXCEPT WHEN THEY ARE NOT: ACCEPTABLE HYPOCRISIES AND THE RULE OF LAW 22–25 (2010) (discussing the historical importance of appearance-based assessments of judges as well as the relationship of such assessments to public opinion).

5. *See, e.g.*, James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 354 (1998) (arguing that judges are able to distance themselves from displeasing decisions by placing responsibility for unpopular opinions on the law); *cf.* Trevor L. Brown & Charles R. Wise, *Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine*, 119 POL. SCI. Q. 143, 151–52 (2004) (examining constitutional courts in the former Soviet Union in order to demonstrate that a separation of powers and an

The public cares about how judges look. The avoidance of actual judicial improprieties is necessary to secure judicial legitimacy, but it is not sufficient. Judges must also visibly appear to play the role of neutral arbiter in order to reduce the probability of actual bias and to maintain popular support.[6]

The importance of appearances has long been evident in the codes of judicial conduct. As Charles Geyh has observed, the first Canons of Judicial Ethics, created in 1924, paid significant attention to questions of appearance.

> Canon 4 declared that a judge's official conduct should be "free from . . . the appearance of impropriety." Eleven other canons cautioned judges to avoid conduct that could create "suspicion" of misbehavior or "misconceptions" of the judicial role that might "appear" or "seem" to interfere with judicial duties, or that could "create the impression" of bias.[7]

The original concern for judicial appearances remains central to the modern judicial conduct codes now established in all fifty states.[8] The same concern for maintaining the propriety of judicial appearances can also be found in the federal Code of Conduct for United States Judges.[9]

The widely recognized importance of judicial appearances suggests two questions: What images of the courts and judicial decision making were conveyed by the Kagan confirmation process?

---

independent judiciary are necessary preconditions for a court's decisions to garner public respect).

6. *Cf.* Chris W. Bonneau & Damon M. Cann, The Effect of Campaign Contributions on Judicial Decisionmaking 17–18 (Feb. 4, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1337668 (arguing that attorney contributions to judicial campaigns have a statistically significant positive effect on judicial decisions, in that as campaign contributions from an attorney increase, decisions involving a donee-judge and a corresponding donor-attorney are more likely to be favorable to the latter).

7. Charles Geyh, *Preserving Public Confidence in an Age of Individual Rights and Public Skepticism*, *in* BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA 21, 29 (Keith J. Bybee ed., 2007) (citations omitted).

8. *See, e.g.*, *id.* at 30–32.

9. *See* JUDICIAL CONFERENCE, ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY 3–5 (2009), *available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf. Canon 2 is titled: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities." *Id.* at 3.

What is the significance of these images? Whether one thinks that the confirmation process is a good way of identifying qualified nominees or is merely a "waste of everyone's time,"[10] it is undeniably true that Supreme Court confirmations prominently display claims about how the Court works and what counts as a good Justice. A day may come when the Court's oral arguments (and Justice Kagan's hair) are a staple of the television broadcast schedule. Until that day arrives, however, it is fair to say that one of the most significant public discussions of the Court happens when a vacancy on the high bench is being filled.[11] If we are interested in identifying and evaluating how the Court appears to the American people, then the confirmation process—beginning with the hearings in the Senate Judiciary Committee and ending with the full Senate's confirmation vote—merits careful study.

In this Article, I examine the images of judging generated by the Kagan confirmation process. I develop my argument in three sections. In Section I, I provide a brief overview of existing public perceptions of the Supreme Court. I argue that a large portion of the public sees the Justices as impartial arbiters who can be trusted to rule fairly. At the same time, a large portion of the public also sees the Justices as political actors who are wrapped up in partisan disputes. To the extent that the confirmation process is consistent with prevailing public views, we should expect the process to transmit contradictory images of judicial decision making, with a portrait of judging as a matter of reason and principle vying for attention with a picture of judging as a political enterprise.

In Section II, I identify the different appearances of judicial action at play in the Kagan confirmation process by assessing all confirmation-related news articles, editorials, opinion pieces, and blog posts published in the *Washington Post*, *New York Times*, and *Los Angeles Times*. I find that the confirmation coverage in these three newspapers conveys a contradictory mix of images that closely

---

10. Ronald Dworkin, *The Temptation of Elena Kagan*, N.Y. REV. BOOKS, Aug. 19, 2010, http://www.nybooks.com/articles/archives/2010/aug/19/temptation-elena-kagan (calling confirmation hearings a "waste of everyone's time, a parade of missed opportunities").

11. Although confirmation processes do not typically dominate the news, they can draw significant public attention. *See* Jennifer Agiesta, *Majority Back Kagan Confirmation as Interest Wanes*, WASH. POST (July 20, 2010, 6:00 AM), http://voices.washingtonpost.com/behind-the-numbers/2010/07/majority_back_kagan_confirmati.html (referencing polls conducted during the Kagan confirmation process that showed about forty percent of those surveyed paid attention to the process).

corresponds to the contradictory views of the Supreme Court already held by a large number of Americans. Thus the confirmation process seems to have reaffirmed and reinforced existing public perceptions.

In the final Section of the Article, I consider the significance of the Janus-faced public beliefs about the Supreme Court. One can certainly argue that the political view of the Court will undermine the belief that the Justices are impartial arbiters, inexorably leading to the conclusion that members of the Court are simply political agents hiding their partisan agenda under a cover of law. I acknowledge the ways in which political perceptions can chip away at judicial legitimacy, but I also argue that the public's competing views may ultimately have a stable coexistence. If we believe that individuals generally place contradictory demands on the courts, calling for an objectively fair system and at the same time seeking a guarantee that their own side will prevail, then a judiciary that appears at once to be governed by impartial principle and by partisan preference begins to make sense. This is by no means to say that such a paradoxical system is equitable or just. But it may well be the system that best suits our conflicting desires.

I. PUBLIC VIEWS OF THE SUPREME COURT

The conventional understanding of judicial decision making requires judges to be shielded from politics and allowed to render decisions based on an impartial reading of the law.[12] This does not mean, of course, that judges must approach controversies without any preexisting beliefs about what the law requires. As a practical matter, judges inevitably come to the bench with some preconceived views of the law. The conventional expectation of judicial impartiality does not ask judges to abandon their legal preconceptions so much as it calls upon them to not let preconceptions "harden into prejudgments," preventing them from giving fair weight to the facts, law, and arguments that will be presented in the disputes before the courts.[13] The American Bar Association considers this ideal

12. *See* ABA Comm. on the 21st Century Judiciary, JUSTICE IN JEOPARDY 1 (2003), *available at* http://www.abanet.org/judind/jeopardy/pdf/report.pdf (recommending methods for minimizing the "corrosive effect of money on judicial election campaigns").

13. Richard Briffault, *Judicial Campaign Codes After* Republican Party of Minnesota v. White, 153 U. PA. L. REV. 181, 211 (2004).

of judicial impartiality to be so broadly shared that it is an "enduring principle."[14]

> Judges occupy the role of umpires in an adversarial system of justice; their credibility turns on their neutrality. To preserve their neutrality, they must neither prejudge matters that come before them, nor harbor bias for or against parties in those matters. They must, in short, be impartial, if we are to be governed by the rule of law rather than by judicial whim.[15]

Public opinion surveys suggest that most of the American public sees the Supreme Court as living up to this conventional expectation of judicial impartiality. Numerous studies demonstrate that the Court receives a significant degree of public goodwill because it is generally thought to be an even-handed guarantor of basic democratic values for all.[16] Polls show that sixty-six percent of Americans trust the Court to operate in the best interests of the American people either "a great deal" or "a fair amount," and that seventy-five percent of the public either "agree or strongly agree" that the Court can usually be trusted to make decisions that are right for the country as a whole.[17] Moreover, the Court is, according to most people, properly insulated from the machinations of the other branches of government.[18] When asked whether federal judges should be subject to

---

14. *See* ABA Comm. On the 21st Century Judiciary, *supra* note 12, at 6.

15. *See id.* at 9.

16. *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 658 (1992); James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 529–30 (2007) [hereinafter Gibson, *Legitimacy of the Supreme Court*]; James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 364 (2003) [hereinafter Gibson et al., *Measuring Attitudes*] (explaining that individual Court decisions have little effect on public goodwill due to the Court's longstanding role in upholding basic freedoms).

17. Kathleen Hall Jamieson, *Public Understanding of and Support for the Courts: 2007 Annenberg Public Policy Center Judicial Survey Results*, ANNENBERG PUB. POL'Y CENTER UNIV. PA. (2007), *available at* http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf.

18. *See* Kathleen Hall Jamieson & Michael Hennesy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899, 899 (2007) (finding public confidence in the Supreme Court remains high despite doubts about the Court's impartiality). *See generally*, Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903 (2007) (emphasizing the essential nature of judicial independence and affirming the author's confidence that Americans will maintain judicial independence).

greater political control by elected officials, over two-thirds of those surveyed said "no."[19]

Yet, even though solid majorities believe that the Supreme Court makes fair decisions and impartially advances general welfare, a large number of Americans also believe that members of the Court are influenced by politics. Some of the very same opinion studies that show broad belief in the Court's good offices also indicate a widely shared view that the Court operates with too little regard for either legal principles or impartiality, with a near majority of respondents agreeing that the Court is "too mixed up in politics."[20] A majority—sixty-two percent—of the public agrees that judicial decision making should not be affected at all by whether a Justice is a political liberal or a political conservative, but a significant number of Americans—forty-three percent—also believes that political ideology actually has a "large impact" on Court decisions.[21] Thus, it is not surprising to find that the public often rates the Court in partisan terms, routinely evaluating Court performance from the perspective of individual party affiliation.[22] Positive opinions of the Court have been shown to fall among Democrats and conservative Republicans when the former find leading decisions to be too conservative and the latter find decisions to be not conservative enough.[23] And

---

19. *Poll: Americans Don't Want Politicians Constraining Judges*, CNN.COM (Oct. 28, 2006, 9:01 PM), http://www.cnn.com/2006/POLITICS/10/27/activist.judges.

20. Gibson, *Legitimacy of the Supreme Court*, *supra* note 16, at 519; Gibson et al., *Measuring Attitudes*, *supra* note 16, at 358; *see also* James L. Gibson & Gregory A. Caldeira, Supreme Court Nominations, Legitimacy Theory and the American Public: A Dynamic Test of the Theory of Positivity Bias (July 4, 2007) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=998283 (examining statistical data of interest group advertisements during Justice Alito's confirmation that encouraged public belief that the Supreme Court is "just another political institution"). *But cf.* James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187 (2005) (arguing that survey data show the Supreme Court has stronger ability than Congress to "legitimize" certain policies that the public finds objectionable).

21. John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 185 (2001).

22. Joseph Carroll, *Slim Majority of Americans Approve of the Supreme Court*, GALLUP NEWS SERV. (Sept. 26, 2007), http://www.gallup.com/poll/28798/Slim-Majority-Americans-Approve-Supreme-Court.aspx; *Republicans Less Positive Toward Supreme Court*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (July 9, 2010), http://people-press.org/report/632.

23. *Supreme Court's Image Declines as Nomination Battle Looms*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS (June 15, 2005), http://people-press.org/report/247/supreme-courtsimage-declines-as-nomination-battle-looms.

when asked what sort of judge is most likely to let personal beliefs influence legal decisions, forty percent of those polled said liberal judges, thirty-nine percent said conservative ones, and thirteen percent thought that both were equally likely to do so.[24] For many members of the public, the overwhelming prevalence of conventional talk about impartial and principled judicial decision making does not prevent judging from looking like a matter of politics, pure and simple.

In the final section of this Article, I will consider how the public's conflicting views of the Supreme Court—views that take the Court to be at once an institution of impartial principle and an arena of political bias—can be said to relate to one another.[25] As an initial matter, however, a general understanding of public perceptions provides a useful basis for generating expectations about the appearances of judging that were broadcast by the Kagan confirmation process.

Thus, to the degree that the confirmation process is consistent with prevailing public beliefs, we should expect Senate hearings and debate to generate contradictory images of Supreme Court Justices as neutral arbiters and as political actors.[26] On the one hand, we should anticipate that there will be efforts to present the activity of judging as a matter of impartial principle, reason, and restraint. The most extended articulation of this conventional ideal of judging is most likely to come from the nominee herself. On the other hand, we should also anticipate that the confirmation process will appear to be a matter of politicians and pressure groups competing to install ideological fellow travelers on the bench. We should expect this second image of judging to be framed in terms of the conventional ideals endorsed by the nominee. That is, we can expect everyone involved in the process to decry the influence of politics on the high bench. Senators will deny that they are applying any kind of ideological litmus test and will insist that they are simply supporting judicial

---

24. Susan Page, *What Americans Want in O'Connor Court Vacancy*, USA TODAY (July 13, 2005, 11:08 PM), http://www.usatoday.com/news/nation/2005-07-13-court-cover_x.htm.

25. *See* BYBEE, *supra* note 4, at 6–10, 16–18 (stating public perceptions of both state judges and all judges generally are similarly split into contradictory camps).

26. Reasoning along these lines, I wrote a short article outlining expectations for the confirmation process that was published at the beginning of the Judiciary Committee hearings. *See* Keith J. Bybee, *Kagan's Confirmation: Conflicting Imagery*, JURIST (June 28, 2010), http://jurist.org/forum/2010/06/kagans-confirmation-conflicting-imagery.php. I draw from this article in the above paragraph.

nominees who will adhere to the law. And yet, even as participants in the confirmation process extol the standard judicial virtues, we should anticipate a clear message indicating that most participants actually want something quite different: rather than impartiality and open-mindedness, they seek a person who will reliably advance issues of interest to important political constituencies.

II. IMAGES OF JUDICIAL ACTION IN THE CONFIRMATION PROCESS

What images of judging did the Kagan confirmation process in fact produce? In order to gain some leverage on this question, I examined all confirmation-related news articles, editorials, opinion pieces, and blog posts published in the *Washington Post*, *New York Times*, and *Los Angeles Times* from the start of the Senate Judiciary Committee hearings on June 28, 2010, until the final Senate vote to confirm Kagan on August 5, 2010.[27] The material from the three newspapers was gathered using the built-in search functions at each paper's website. The name "Kagan" was selected as the basic search term because it not only established outer limits on the search (the name is somewhat specific to the confirmation process during the relevant time period), but also promised to deliver a comprehensive set of results. Table 1 displays the search results, with coverage categorized by type in order to give a sense of what the individual newspapers published, as well as to indicate the overall distribution of material.

27. These three newspapers were selected in order to provide a fair sample of the confirmation images conveyed to the American public. The *Washington Post*, *New York Times*, and *Los Angeles Times* rank among the top five largest newspapers in the nation. *See* MONDONEWSPAPERS.COM, http://www.mondonewspapers.com/circulation/usatop100.html (last visited Apr. 6, 2011). These three newspapers are also based in different regions and, taken together, they address major segments of the overall American population. In addition to the representativeness of their coverage, the three newspapers also are accessible to the researcher: the newspapers regularly report on the courts and each provides its own search engine for easily retrieving all articles on a given subject.

Table 1: Amount of Kagan Confirmation Process Coverage in Selected National Newspapers, 6/28/10–8/5/10[28]

Newspapers	Articles	Blog Posts	Editorials & Opinion	**Total**
Los Angeles Times	19	15	5	39
New York Times	22	44	10	76
Washington Post	41	57	24	122
Total	82	116	39	237

As the table indicates, the *Washington Post* offered the greatest amount of coverage, a result of the fact that the confirmation process was a "hometown" event for the newspaper. The table also indicates that the greatest amount of coverage overall came in the form of blog posts. The high number of such posts reflects the ease of blogging and should not be considered a measure of comprehensive reporting. Many blog posts were quite short; a number were limited to a single breaking development—such as a senator announcing how she planned to vote on the confirmation—or to conveying a humorous aside. Other blog posts were little more than a list of links to confirmation news articles to be found in the day's newspaper or elsewhere on the Web. On the whole, the news articles and opinion pieces tended to be substantially longer and more detailed than the blog posts.[29]

In analyzing the material, my goal was to identify the images of judging projected by the entire confirmation coverage in the three newspapers. I did not suppose that any single reader would read all of the coverage offered by any one outlet. Instead, I reasoned that the totality of material published by the newspapers would be a fair sample of the complete universe of confirmation coverage generated by all media. To learn how three large newspapers framed the confirmation process for their readers is, I would argue, to gain a good

28. All newspaper articles and other newspaper content gathered as part of this compilation are on file with the author.

29. The news articles and opinion pieces did, of course, significantly differ from one another in tone and style.

understanding of how the media as a whole represented Kagan's journey from the committee hearings to the final vote.

With the description of the newspaper material and of my research rationale in mind, we can address a reformulated version of the question with which this Section began: What images of judging were projected by the *Washington Post*'s, *New York Times*', and *Los Angeles Times*' coverage of the Kagan confirmation process?[30]

All three newspapers clearly conveyed the impression that judicial decision making is a matter of impartial principle, and did so primarily by reporting the words of Kagan herself. A number of Kagan's comments featured in the newspapers came from her exchanges with the Senators on the Judiciary Committee, where she repeatedly insisted that judging is a modest activity restricted to the impartial gauging of arguments and evidence in each case:

- "As a judge, you are on nobody's team. As a judge, you are an independent actor."[31]

- "I'm sure that everybody [on the Supreme Court] is acting in good faith. You wouldn't want the judicial process to become in any way a bargaining process or a logrolling process. You wouldn't want people to trade with each other—you know, 'You'll vote this way, and I'll vote that way, and then we can . . . get some unanimous decisions.'"[32]

- "[Congress] ought to be the policymakers for the nation. . . . The courts have an important role to play, but it's a limited role. It's essentially sort of policing the boundaries and making sure that Congress doesn't overstep its role, doesn't violate individual rights or

30. Please observe that in the following discussion of the newspapers' coverage, I cite only some of the published items that verify each of the claims I make in the text. I have opted for illustrative article citation since exhaustive citation would greatly lengthen each footnote without good reason.

31. *Kagan Draws Mixed Reactions from Senate Judiciary Committee*, L.A. TIMES, June 30, 2010, http://articles.latimes.com/2010/jun/30/nation/la-na-kagan-hearing-react-20100701.

32. Robert Barnes & Amy Goldstein, *Kagan Finishes Supreme Court Confirmation Hearings*, WASH. POST, July 1, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/30/AR2010063000369.html.

> interfere with other parts of the governmental system."[33]

- "You shouldn't want a judge who will . . . tell you that she will reverse a decision without listening to arguments and without reading briefs and without talking to colleagues."[34]

The image of the judge as impartial arbiter was also evident in Kagan's opening statement to the Judiciary Committee, in which Kagan explained how her experience in various settings taught her a set of lessons about the neutrality, principle, reason, and restraint of the Court.[35] On the basis of these lessons, Kagan pledged "[to] listen hard, to every party before the Court and to each of my colleagues . . . . [to] work hard . . . . [and to] do my best to consider every case impartially, modestly, with commitment to principle, and in accordance to law."[36]

The newspaper coverage also managed to communicate an ideal of impartial judging when it was not directly reporting Kagan's words. Some pieces offered defenses of Kagan's claims to impartiality and restraint, presenting the nominee as charting a principled course throughout the Judiciary Committee hearings.[37] Various editorials and opinion columns appealed to Kagan as a person seriously committed to legal principle, and attempted to persuade

---

33. Adam Liptak, *Kagan Reminds Senators: Legislation Is Your Job*, N.Y. TIMES, July 2, 2010, http://www.nytimes.com/2010/07/02/us/politics/02assess.html.

34. James Oliphant, *Kagan Slips on Fruits and Vegetables in Senate Panel Questioning*, L.A. TIMES, July 1, 2010, http://articles.latimes.com/2010/jul/01/nation/la-na-kagan-hearings-20100701.

35. *Elena Kagan's Opening Statement to the Senate Judiciary Committee*, L.A. TIMES (June 28, 2010, 3:38 PM), http://latimesblogs.latimes.com/washington/2010/06/elna-kagan-judiciary-statement-supreme-court.html.

36. *Id.*; *accord* Michael Muskal, *Supreme Court Nominee Elena Kagan Vows to Work Impartially*, L.A. TIMES, June 28, 2010, http://articles.latimes.com/2010/jun/28/nation/la-na-elena-kagan-supreme-court-20100628 (quoting same excerpt).

37. *See* Editorial, *Confirm Elena Kagan*, WASH. POST, July 4, 2010, at A18 ("Kagan showed herself to be an intellectually gifted person with an impressive grasp of a wide array of legal matters."); E.J. Dionne, Jr., Op-Ed., *Supreme Evolution*, WASH. POST, July 5, 2010, at A13 ("The standard account of Kagan's testimony is that she was brilliant, charming and evasive."); *see also* Robert Barnes, *Cautious Answers Frustrate Senators*, WASH. POST, July 4, 2010, at A3 (describing the frustration of Senators on the Judiciary Committee during the past four Supreme Court confirmation processes stemming from non-specific answers from the nominees).

her to adopt one jurisprudential philosophy or another.[38] And still other articles zeroed-in on Republican Senator Lindsey Graham, portraying his support of Kagan as an indication that the confirmation process was not a partisan affair, but instead turned on the question of whether the nominee had the knowledge, prudence, and temperament necessary for impartial judgment.[39]

The image of impartial judicial decision making was not, however, the only image to be found in the newspapers. Indeed, the image of the impartial jurist was not even the most common vision of judging presented by the coverage. The far more frequent rendering of judicial action centered on politics. For many Republican Senators the clearest example of the political judge was Kagan herself. From the outset Republicans tended to "cast Kagan as an inexperienced, progressive political operative who would work to preserve [President Barack Obama's] policy agenda once on the high court rather than serve as an objective jurist."[40] For example, in announcing his decision to vote against Kagan, Senator Orrin Hatch called her "a skilled political lawyer" and criticized her for supporting jurists that Hatch considered to be activists.[41] "The law must control the judge;

---

38. *See* Jonathan Rauch, Op-Ed., *A 'Kagan Doctrine' on Gay Marriage*, N.Y. TIMES, July 3, 2010, at A19; Jeffrey Rosen, Op-Ed., *Brandeis's Seat, Kagan's Responsibility*, N.Y. TIMES, July 4, 2010, at A8 (arguing that Kagan's reference to Justice Oliver Wendell Holmes, Jr. as her model of judicial restraint was misguided, and contending instead that she should consult Justice Louis Brandeis's jurisprudence as a "far more relevant guide as [Kagan] grapples with the issues at the center of our current constitutional debates"); *see also* Katrina Vanden Heuvel, *Retiring Chief Justice Roberts's Umpire Analogy*, WASH. POST (June 28, 2010, 5:16 PM), http://voices.washingtonpost.com/postpartisan/2010/06/retiring_chief_justice_roberts.html (arguing that it is "patently impossible" for Supreme Court justices to mechanically rule on issues in the same manner as "umpires").

39. *E.g.*, Dana Milbank, *One of These Senators is Not Like the Others*, WASH. POST, July 21, 2010, at A2; David G. Savage, *Elena Kagan Approved by Senate Judiciary Committee in 13–6 Vote*, L.A. TIMES, July 21, 2010, http://articles.latimes.com/2010/jul/21/nation/la-na-kagan-vote-20100721; Sheryl Gay Stolberg, *Senate Panel Backs Kagan Nomination, With One Republican Vote*, N.Y. TIMES, July 21, 2010, at A11; *cf.* Aaron Blake, *Bush Administration Lawyers Praise Kagan*, WASH. POST (July 1, 2010, 6:17 PM), http://voices.washingtonpost.com/44/2010/07/bush-administration-lawyers-pr.html (describing rationales of unlikely Kagan supporters other than Senator Graham in order to show that some may have evaluated Kagan's judicial abilities without viewing the confirmation process through a rigid partisan or ideological lens).

40. James Oliphant, *Senate Begins Debate over Supreme Court Nominee Kagan*, L.A. TIMES, Aug. 3, 2010, http://articles.latimes.com/2010/aug/03/nation/la-na-kagan-nomination-20100804.

41. *Id.*

the judge must not control the law," Hatch argued.[42] Senator Jeff Sessions reached the same conclusion:

> I believe she does not have the gifts and the qualities of mind or temperament that one must have to be a justice . . . . [Kagan would be] an activist, liberal progressive, politically minded judge who will not be happy simply to decide cases but will seek to advance her causes under the guise of judging.[43]

Most Democratic Senators countered Republican criticism of Kagan by characterizing her as an exemplar of conventional judicial ideals. Senator Patrick Leahy, for example, declared that Kagan "will do her best to consider every case impartially, modestly, and with commitment to principle and in accordance with law."[44] Democrats then refocused the deflected criticism of political judging onto the conservative Justices sitting on the Supreme Court. "The rightward shift of the Court under Chief Justice Roberts is palpable," Senator Chuck Schumer argued.[45] "In decision after decision, special interests are winning out over ordinary citizens. In decision after decision, this court bends the law to suit an ideology."[46]

The dueling Republican and Democratic assertions about the identity of the real political judges might simply be read as evidence of bipartisan support for the conventional ideal of impartial judicial decision making. After all, neither party invoked the idea of "political judging" as a form of praise and the Senators regularly described their ideal member of the Court in conventional language of impar-

---

42. Bernie Becker, *Hatch Opposes Kagan*, N.Y. TIMES (July 2, 2010, 11:35 AM), http://thecaucus.blogs.nytimes.com/2010/07/02/hatch-opposes-kagan.

43. David M. Herszenhorn, *In Senate, Vote Nears on Kagan Nomination*, N.Y. TIMES, Aug. 4, 2010, at A14.

44. Oliphant, *supra* note 40.

45. Alec MacGillis & Amy Goldstein, *Kagan Says She Would Take a 'Modest' Approach on Supreme Court*, WASH. POST, June 29, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/06/28/AR2010062801859.html.

46. *Id.* (explaining further the "vigorous attempt" of Democrats to denounce the direction of the Roberts Court with allegations that "Roberts and his conservative colleagues" were the only true activist judges on the Court); *cf.* E.J. Dionne, Jr., Op-Ed., *Whose Court Is It?*, WASH. POST, June 28, 2010, at A15 (examining Democrats' plans to promote the rights of individuals to challenge corporate power as a check on "activist conservative judging").

tiality and principle.[47] The newspaper coverage argues against such a reading, however, by repeatedly suggesting that few of the Senators really placed much stock in the conventional ideals they espoused. Throughout the Judiciary Committee hearing "both sides prevailed upon Kagan to be the very thing that both sides say they decry: a nominee with preformed views about the law."[48] The newspapers consistently presented the Senators as being locked in a political battle whose lines had been drawn by the then-looming midterm elections.[49] In this context, senatorial exchanges were not a part of joint deliberations so much as they were efforts to score political points and placate key partisan constituencies.[50]

The political competition that galvanized the Senators also diminished Kagan, pushing her to the margins of a confirmation process that was ostensibly designed to focus on the nominee.[51] The intense political competition also cast doubt on Kagan's own professions of principle and impartiality.[52] Just as the Senators were portrayed as manipulating the process in order to promote political objectives on the bench and at the polls,[53] Kagan was portrayed as

---

47. *Kagan Meets with Key Senators*, CNN.COM (May 12, 2010), http://articles.cnn.com/2010-05-12/politics/kagan.congress_1_supreme-court-confirmation-process-elena-kagan; *accord* Becker, *supra* note 42 (indicating Republican concerns with "activist judicial philosophies"); Oliphant, *supra* note 40 (citing one Senator's support for Kagan based on "[Kagan's] impartiality, modesty, and commitment to principle").

48. Oliphant, *supra* note 34.

49. *See, e.g.*, James Oliphant, *Elena Kagan's Confirmation Hearing to Start Monday*, L.A. TIMES, June 28, 2010, http://articles.latimes.com/2010/jun/28/nation/la-na-kagan-hearings-20100628 (describing the confirmation hearings as a platform for Democrats and Republicans to make campaign arguments, turning the hearings into "even more of a piece of political theater than usual").

50. *See* Sheryl Gay Stolberg, *Confirmation is Likely, But Not G.O.P. Support*, N.Y. TIMES, July 2, 2010, at A16.

51. *E.g.*, Ashley Southall, *The Early Word: Kagan's Confirmation Hearings*, N.Y. TIMES (June 28, 2010, 7:25 AM), http://thecaucus.blogs.nytimes.com/2010/06/28/the-early-word-kagans-confirmation-hearings (characterizing Kagan as taking a backseat to the "dueling rhetoric of Democrats and Republicans" during the confirmation hearings).

52. *See* Dana Milbank, Op-Ed., *Welcome to Dodge City*, WASH. POST, June 30, 2010, at A2 (arguing that Kagan's "passion is to win confirmation . . . and the surest path to [being confirmed] is to do exactly what she complained about previous nominees doing: being vapid"). For insight into then-Professor Kagan's views on the confirmation process, see Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919 (1995). During her own confirmation, several of Kagan's statements from this law review article were used against her by her Senate opponents. Kagan wrote, "When the Senate ceases to engage nominees in meaningful discussion of legal issues, the confirmation process takes on an air of vacuity and farce, and the Senate becomes incapable of either properly evaluating nominees or appropriately educating the public." *Id.* at 920.

53. *See* Sheryl Gay Stolberg & Charlie Savage, *In 2nd Day of Quizzing, Kagan Sticks to Script*, N.Y. TIMES, July 1, 2010, at A19.

using the process to advance her own interest in getting confirmed.[54] She was repeatedly presented as carefully following a "script" that dictated her every gesture and comment.[55] Her participation was simply conveyed as an act, a show designed to secure her elevation to the high bench without revealing anything about the person on stage. The Senators seemed to recognize that Kagan's heavily coached remarks resembled the artificial, highly orchestrated, and rehearsed statements that elected officials themselves often make ("This is," Senator Durbin observed, "an art form we have developed."[56]). And yet, Senators from both parties also condemned Kagan's performance as a "game of 'hide the ball.'"[57] Ultimately, no one appeared to like evasion and pretense, including those who acknowledged their dependence on these very devices.

III. THE SIGNIFICANCE OF CONTRADICTORY IMAGES

How should the Kagan confirmation process's contradictory images of judging—images that map onto the conflicting perceptions that Americans generally have of the Supreme Court—be understood?

Perhaps the most straightforward way to answer this question is to say that the public's inconsistent views threaten judicial legitimacy. As a leading scholar writes,

> [t]he more that the public and their representatives think that judges generally—not just a particular judge or panel of judges in isolated cases—follow their political leanings instead of the law, the more

54. Milbank, *supra* note 52.

55. *Id.*; Stolberg & Savage, *supra* note 53; R. Jeffrey Smith, *With Votes Looming, Kagan Plays It Cool*, WASH. POST, July 11, 2010, at A4; *see also* Jonah Goldberg, Op-Ed., *Why the Kagan Hearings Will be a Charade*, L.A. TIMES, June 29, 2010, http://articles.latimes.com/2010/jun/29/opinion/la-oe-goldberg-kagan-20100629 (encouraging Kagan to follow her own academic writings by answering questions fully and truthfully during the hearings). *See generally* Anne E. Kornblut & Paul Kane, *Kagan Starts Hearings as Elusive GOP Target*, WASH. POST, June 28, 2010, at A1 (explaining that White House and Justice Department officials have advised recent Court nominees to avoid saying anything controversial during the confirmation process).

56. Paul Kane, *Kagan Nomination Approved by Senate Judiciary Panel*, WASH. POST (July 20, 2010, 1:12 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/20/AR2010072000559.html.

57. *Id.*

> likely it becomes that long-established [judicial] independence norms will be challenged with increasing intensity and will ultimately yield to calls for greater judicial accountability to Congress.[58]

With a large segment of the public dubious about the impartiality of the Court's decisions, it seems that the judiciary's standing as an independent, authoritative arbiter of disputes is in danger, raising the specter of a coming age "where political officials tell judges how to decide cases."[59] Indeed, some commentators believe that we are already at the threshold of "a war of all against all within and through the law."[60] Without a rock-solid belief that the judiciary is limited by impartial principle, law will soon be "little more than the spoils that go to winners in contests among private interests who, by their victory, secure the prize of enlisting the coercive power of the legal apparatus to enforce their agenda."[61] Those who end up on the losing side of this bleak system will comply only out of fear of punishment and because of "the hope that they might prevail in future contests to take their turn to wield the law."[62]

The newspaper coverage of the Kagan confirmation process explicitly raised this prospect of a significantly delegitimized judiciary. After Kagan was confirmed by the Senate, Curt Levey of the Committee for Justice, a group that opposed confirmation, argued that political perceptions would continue to haunt Justice Kagan on the bench. "The confirmation process inevitably resulted in Kagan losing some legitimacy in the eyes of the public . . . [and that] will make Americans more skeptical of any controversial decisions she's part of."[63] In a similar spirit, Senator Amy Klobuchar openly worried that the sharp partisanship that marked the confirmation would sub-

---

58. CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 263 (2006).

59. Anthony Lewis, *Afterword: The State of Judicial Independence*, *in* BENCH PRESS: THE COLLISION OF COURTS, POLITICS, AND THE MEDIA, *supra* note 7, at 201.

60. BRIAN Z. TAMANAHA, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 225 (2006).

61. *Id.*

62. *Id.*

63. James Oliphant, *Kagan Cleared for High Court*, L.A. TIMES, Aug. 6, 2010, http://articles.latimes.com/2010/aug/06/nation/la-na-elena-kagan-20100806 (quoting Levey).

stantially undermine the "people's faith in the Court" as an independent and impartial body.[64]

Yet the newspaper coverage also contained some indications that the demise of judicial legitimacy was far from certain. Although the confirmation process appeared to be a highly partisan affair with a belief in the political nature of judging at its core, it is still the case that Americans consider the Supreme Court to be an impartial arbiter.[65] As Douglas Kendall observed, in the same news article where Levey and Klobuchar predicted the judiciary's demise, "[Democratic Senators] tried the same general strategy with the Alito nomination with a stronger case, higher stakes and more media focus, and I don't think very many Americans now view Alito to be an illegitimate Justice."[66]

Opinion surveys similarly suggest that the politics of confirmation do not necessarily impugn the public's perception of the Court's character. As described in Section I, a substantial plurality of Americans believe that political ideology infects Supreme Court decision making, even as a large majority of the public insists that political commitments ought to have no impact on the Justices at all.[67] The remarkable fact, however, is that the large gap between the expectation of political neutrality and the acknowledgement of political influence does not have a significant negative effect on overall evaluations of the Court.[68] The perception that Justices may not actually operate according to the conventional dictates of impartiality does not seem to threaten public confidence in the Court after all.

How can this be? By way of conclusion, let me suggest how we can begin to think about a stable coexistence between appearances of impartial judgment and politically influenced decision making.

If we believe that people rely on the judicial process strictly as a source of principled and impartial adjudication, then the perception that judges may operate on the basis of partisan preference can

---

64. *Id.*

65. Lydia Saad, *Supreme Court Starts Term with 51% Approval*, GALLUP (Oct. 6, 2010), http://www.gallup.com/poll/143414/Supreme-Court-Starts-Term-Approval.aspx.

66. Oliphant, *supra* note 63.

67. *E.g.*, Scheb & Lyons, *supra* note 21 and accompanying text (discussing a study that shows sixty-two percent of Americans hold this absolutist view).

68. *Id.* at 187–88 (discussing how perceived ideologies of individual Justices have little predictive value in the context of evaluating people's overall perspectives of the functionality of the Supreme Court as a unit).

only be corrosive. Yet, if we think that individuals not only may seek principled and impartial judgment, but also may wish merely to drape themselves in the mantle of principled impartiality, then a process beset by conflicting public beliefs makes a degree of sense. The suspicion that judges might not conform to the conventional understanding of objective reasoning and fair judgment will still eat away at public confidence. At the same time, the suspicion of political judgment will also attract all those who wish to merely dress up their preferences in the formal language of law in the hope that this will allow their cause to look better than it actually is.

Viewed from this perspective, law is a body of tests and procedures that asks individuals to seek impartial standards of judgment outside their own will while also creating an arena for the pursuit of personal interests and political attachments. Such an arrangement may rightly be criticized for appearing unfair, unreasonable, and inconsistent. But it is also an arrangement that may endure because it conforms to the contradictory desires of people who at once wish to have a neutral system of dispute resolution and want to ensure that their preferred side wins.

Given this jumble of principle, politics, and posturing, it is no wonder that the Supreme Court confirmation process fails to coalesce around a single image of what judicial decision making really is.